90-739

(1)

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

NO:

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

CLARENCE E. CRAYTON, WILLIE MAE CRAYTON AND EDRICE C. RIVERS,

Petitioners

v.

PRICHARD HOUSING AUTHORITY, THE CITY OF PRICHARD, AND RICHARD COMPTON,

Respondents

Petition for Writ of Certiorari: to the United States Court of Appeals For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Nathan P. Friedlander
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The question presented for review is as follows:

I. Whether an owner/landlord who applies for rent and rehabilitation subsidies under the Section 8 Moderate Rehab Program, in circumstances where benefits under the program are designed by the Housing Authority to be distributed on an objective ranking basis, has standing under 42 U.S.C. Sec. 1983 to assert due process and equal protection challenges to the arbitrary and capricious action of the Housing Authority in denying such benefits to the owner/landlord and awarding them to other parties when, were it not for such arbitrary and capricious action, the benefits would have been received.

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case.

1. Counsel for Appellees, Michael Figures, Eugene Seidel and John Grisso;

2. Housing Authority of the City of Prichard, Charles Pharr and Richard Compton as Director of the United States Department of Housing and Urban Development;

3. Counsel for Appellants: Nathan P. Friedlander;

4. Appellants, Clarence E. Crayton, Willie Mae Crayton and Edrice C. Rivers;

5. Trial Judge:

Charles R. Butler, Jr., United States District Judge for the Southern District of Alabama.

NATHAN P. FRIEDLANDER

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TABLE OF AUTHORITIES

1. Black v. Beame,
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7. Roberts v. Secretary, Department of Housing and Urban Development,
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The opinion of the District Court for the Southern District of Alabama was not reported. The opinions of the Court of Appeals for the Eleventh Circuit were not reported.

The judgment of the Court of Appeals for the Eleventh Circuit was made and entered on the 30th day of April, 1990 and the denial of the Petition for Rehearing to the Court of Appeals for the Eleventh Circuit was made and entered on the 3rd day of August 1990 and copies thereof are appended to this petition in the Appendix. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) upon petition of the Plaintiffs in the District Court below.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. Amendment XIV, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. U.S.C. Sec. 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress

applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

3. 28 U.S.C. Sec. 1343

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damage for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 43;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulations, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all

persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section --

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

4. 28 U.S.C. Sec. 2201(a)

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration

shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT

These suits arise from the administration of the Section 8 Moderate Rehab Program by the Housing Authority of the City of Prichard in 1983. Under the factual scenario most favorable to the Plaintiffs which was presented to the District Court on motion for summary judgment, the Housing Authority of the City of Prichard (hereinafter "Housing Authority") solicited letters from interested persons, including Plaintiff Clarence Crayton, as part of its request for funding made in 1983 for funds under the Moderate Rehab Program. In the Spring of 1984 the Department of Housing and Urban Development ("HUD") allocated 150 moderate rehab units to the Housing Authority. The Housing Authority then began to solicit proposals from interested persons. The Plaintiffs, who own various units within a subdivision of the City of Prichard known as Prichard Homes, submitted applications for 89 units owned by them, acting in reliance on representations made to Clarence Crayton by the Housing Authority that the Prichard Homes area was targeted for moderate rehab funds and that the Plaintiffs' units were suitable for

inclusion under the program.

The Housing Authority received 450 applications from interested owners. It developed a ranking program to award its 150 unit allocation among these applicants. Approximately 200 units satisfied the threshold criteria for inclusion in the program and were ranked.

However Plaintiffs received a notice that the Housing Authority was, without ranking their properties, rejecting all applications for units located within Prichard Homes Subdivision on the basis that the Housing Authority had determined that the properties, as a group, did not meet certain health quality standards promulgated by HUD and applicable to Section 8 programs. Specifically the Housing Authority made a ruling, without notice or hearing, that the deteriorated state of the water and sewer lines in the area, coupled with the fact that such lines lay in the same trench, created a threat which violated certain Section 8 health quality standards. The Plaintiffs exhausted their administrative remedies in attempting to reverse this determination.

Other Section 8 programs, including the

regular Section 8 and Rental Rehab programs, were operated by the Housing Authority within the Prichard Homes Subdivision at the time. The same health quality standards relied on by the Housing Authority in rejecting the Plaintiffs' applications are applicable to these programs. If the Plaintiffs' applications had been ranked the Plaintiffs would have received 80% of the funding available. However due to the refusal of the Housing Authority to rank their applications or include properties located in the Prichard Homes Subdivision within the allocation the Plaintiffs received no units.

The Housing Authority also awarded a number of Moderate Rehab units to owners of properties in a subdivision known as Alabama Village. According to the superintendent of the Prichard Water and Sewer Board, the conditions relied on by the Housing Authority in rejecting the Plaintiffs' applications existed to the same or worse extent in the Alabama Village Subdivision as in the Prichard Homes Subdivision.

William Clarke is the Congressional Representative for the State Legislature from the

Prichard district. He is a former member of the Housing Authority Board of Commissioners and owns a realty business which does business with the Housing Authority. After the Plaintiffs' applications were rejected, despite no change in circumstances, Representative Clarke was awarded 4 moderate rehab units within the Prichard Homes Subdivision.

Plaintiffs Clarence Crayton and Willie Mae Crayton filed their original complaint in the Circuit Court of Mobile County claiming damages and injunctive relief against the Prichard Housing Authority, the City of Prichard and Richard Compton, Director of the Department of Housing and Urban Development. On June 22, 1987, the action was removed to the United States District Court for the Southern District of Alabama on the Petition of the Defendant Compton. Edrice Rivers was joined as a party Plaintiff on December 30, 1987.

The Plaintiffs' complaint is stated in four separate counts: (1) A federal claim for damages against the Prichard Housing Authority (hereinafter "PHA") on account of alleged arbitrary and discriminatory conduct in the administration of

benefits under the Section 8 Moderate Rehab Program; (2) A claim for declaratory judgment and injunctive relief against PHA and Richard Compton as Director of the Department of Housing and Urban Development (hereinafter "HUD") to determine whether the Defendants acted arbitrarily and in a discriminatory manner in administering benefits under the Section 8 Moderate Rehab Program and enjoining Defendants to either re-evaluate the Plaintiff's applications for inclusion in the program or provide alternative funding; (3) A pendant state claim for damages resulting from fraudulent conduct of Prichard Housing Authority; and (4) A pendant state claim for damages against the Prichard Housing Authority for subjecting Plaintiffs' properties to involuntarily servitude. (R-2-32)

A stipulation of dismissal was filed dismissing the City of Prichard without prejudice.

After discovery the remaining Defendants filed motions for summary judgment and Plaintiffs filed opposition thereto.

On April 5, 1989 the District Court the Honorable Charles Butler presiding, ordered summary

judgment in favor of the remaining Defendants.

Plaintiffs filed their notice of appeal on April 28, 1989.

The parties conducted oral argument before a panel of the Eleventh Circuit Court of Appeals on April 19th, 1990. On April 30th, 1990, the panel of the Eleventh Circuit affirmed the decision of the District Court without opinion, per curiam.

The Plaintiffs filed a petition for rehearing and suggestion of rehearing in banc on or about the 15th day of May, 1990. On August 3rd, 1990, the United States Court of Appeals for the Eleventh Circuit in a per curiam order denied the petition for rehearing and suggestion of rehearing in banc.

EXISTENCE OF JURISDICTION BELOW

The District Court for the United States District of the South District of Alabama had jurisdiction pursuant to 28 U.S.C. Sections 1331, 1343, and 2201(a).

ARGUMENT

The decisions of the Courts below should be reviewed because they erroneously rely on a line of cases holding that there is no private cause of action in an owner/landlord under the National Housing Act and therefore that the Plaintiffs had no claim under the instant factual situation. In fact the Plaintiffs have a cause of action and standing to challenge the conduct of the Defendants under the Fifth and Fourteenth Amendment to the United States Constitution as protected by 42 U.S.C. Sec. 1983. Allowing the decisions of the Courts below to stand deprive the Plaintiffs and other similarly situated applicants for benefits under Section 8 programs to be the victim of arbitrary and capricious dispensation of such valuable government benefits without redress.

Allowing the Housing Authority to deviate from the objective ranking system it developed for administering the Moderate Rehab in question so as to award units on a ad hoc basis to achieve its own politically motivated end not only denied the Plaintiffs due process but struck at the core of the democratic process. Hornsby v. Allen, 326 F.2d

505 (5th Cir. 1964). Allowing the Plaintiffs' grievances to go unresolved by-passes procedural safeguards upon systems of administration of governmental benefits which should be imposed. Black v. Beame, 419 F.Supp. 599 (S.Z.N.Y. 1976) citing Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

Because of the threat to the democratic process arising from the allowance of such arbitrary, capricious and ad hoc administration of government programs such as occurred in the instant case, the issues raised by the Plaintiffs' petition for certiorari are of such exceptional importance so as to warrant review by certiorari. If private citizens such as the Plaintiffs are not allowed to assert such claims although they have been directly injured as a consequence, then who shall watch government agencies such as the Housing Authority of the City of Prichard?

The Plaintiffs submit that their due process and equal protection claims in the instant case are akin to those asserted by the Plaintiffs in Hornsby v. Allen, supra. In that case the Plaintiff, the insuccessful applicant for a license to operate a

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liquor store, brought an action under 28 U.S.C. Sec. 1343 and Sec. 2201 alleging a deprivation of civil rights and seeking declaratory judgment. The Plaintiff alleged that her application was denied without an adequate reason and that the action of the City Council which denied the application was arbitrary, capricious, discriminatory and in contravention of the due process and equal protection clauses of the Fourteenth Amendment. In reversing the District Court's grant of the Defendants' motion to dismiss, the Fifth Circuit ruled that the denial of the license, being based on a determination that the applicant had not satisfied certain qualifications and criteria was adjudicatory in nature and being a judicial act, was subject to the fundamental requirements of due process.

Plaintiffs in the instant case respectfully submit that the determination by the Housing Authority that an imminent health threat existed was likewise an adjudicatory determination and therefore the requirements of due process were applicable. Being adjudicatory, the decision making process of the housing authority was not

subject to unlimited discretion and is subject to being overruled if arbitrary and capricious. Housing Authority of Roosevelt City v. Nunn, 288 So.2d 775 (Ala. 1974); Southern Cooperative Development Fund v. Louis E. Driggers, 696 F.2d 1347 (11th Cir. 1983); Roberts v. Secretary, Department of Housing and Urban Development, 473 F.Supp. 52 (N.D.Miss. 1979).

Likewise the allowance of the Moderate Rehab program in Alabama Village and other Section 8 programs in Prichard Homes, including Representative Clarke's 4 moderate rehab units in Prichard Homes, evidenced a disparate treatment without valid justification which denied the Plaintiffs equal protection.

In the case of Southern Cooperative Development Fund v. Driggers, 696 F.2d 1347 (11th Cir. 1983), summary judgment in favor of the Plaintiffs was affirmed based upon a finding that a local zoning authority's refusal to grant Plaintiffs a preliminary subdivision plat was arbitrary and capricious and violated the Plaintiffs' rights to due process in violation of 42 U.S.C. Sec. 1983 and the Fourteenth Amendment to

the United States Constitution. In contravention of law the commission failed to give any reason for disapproving the plat. The Defendants contended that the Board's denial of the plat application was justified under the subdivision regulations in effect at the time the application was filed. However the record before the Court established that the Plaintiffs had complied with detailed and comprehensive subdivision regulations and that the Commission had no discretion to approve the plat. The conduct of the Commission was held to be administrative in nature and as the Defendants used ad hoc requirements in order to effectuate their purpose, their conduct was held to be arbitrary, capricious and a violation of the Plaintiffs due process rights.

Similarly in the instant case the Housing Authority acted inconsistently and in an ad hoc manner to achieve political ends rather than for the stated purpose of protecting potential Section 8 applicants against any imminent threat condition. The Plaintiffs' applications, if ranked, would have resulted in an award of units to the Plaintiffs. Instead the Housing Authority imposed inconsistent

and ad hoc restrictions, thereby depriving Plaintiffs of a valuable governmental benefit.

Although the particular facts underlying Hornsby, supra (alcoholic licensing) and Southern Cooperative, supra (subdivision zoning restrictions), may be distinguishable from the administration of Section 8 programs, the underlying principles of granting Fifth and Fourteenth Amendment due process protection are directly applicable to objective schemes of distributing government benefits. Because the per curiam decision deviates from these controlling authorities in banc consideration is warranted. Hulls v. New York City Housing Authority, 398 F.2d 262 (2nd Cir. 1968).

It is plain that arbitrary and capricious conduct was engaged in by the Housing Authority to achieve an ad hoc end for the Authority's own benefit. Otherwise how can it be explained that if the condition relied on by the Housing Authority in rejecting the Plaintiffs' applications for the inclusion of units in Prichard Homes Subdivision existed to the same or worse condition in the Alabama Village Subdivision that: (1)

Representative Clarke was awarded units in Prichard Homes; (2) other Section 8 programs were operated in Prichard Homes concurrently with the rejection of the Plaintiffs' applications; and (3) Moderate Rehab and other Section 8 programs were operated in Alabama Village.

Basic to the Plaintiffs' claim is the concept that the process by which the Housing Authority was to award Moderate Rehab funds was, if operated properly, an objective one rather than discretionary. Assuming the Plaintiffs' properties satisfied the threshold criteria for eligibility, then the rank of the properties according to the program standards would determine whether or not Plaintiffs received funding.

In this respect the instant case is distinguishable from the decisions relied on by the District Court holding no due process rights exist where a tenant making application to a landlord or government official with discretion is denied Section 8 assistance. See, e.g., Black v. Beame, 419 F.Supp. 599 (S.D.N.Y. 1976) (in absence of clear right to government benefits federal courts should not second guess state officials'

discretionary decisions on allocation of limited public welfare funds among myriad recipients); Eidson v. Pierce, 745 F.2d 453 (7th Cir. 1984) (applicant for Section 8 rental assistance has no legitimate claim of entitlement to receipt of Section 8 benefits in absence of decision making criteria capable of being explored at due process hearing).

CONCLUSION

Because the Plaintiffs suffered injury in fact they have been damaged and have the right to make claims under 42 U.S.C. Sec. 1983 and 28 U.S.C. Sec. 1343; Hulls v. New York City Housing Authority, 398 F.2d 262 (2nd Cir. 1968). Plaintiffs are further entitled to a declaratory judgment under 28 U.S.C. Sec. 2201. The sole remaining avenue for the Plaintiffs to seek constitutional redress of their injuries is by petition for certiorari to this Court. Therefore it is respectfully submitted that this petition is due to be granted and upon conclusion of the proceedings that the judgments of the District Court of the Southern District of Alabama and the United States Court of Appeals for the Eleventh Circuit are due to be reversed and the

cause remanded for further proceedings in the District Court.

Nathan P. Friedlander

CERTIFICATE OF SERVICE

I, Nathan P. Friedlander, do hereby certify that I served a copy of the Petition for Writ of Certiorari on the 19th day of October, 1990, and on the 8th day of November served a corrected copy on Michael Figures, 2317 St. Stephens Road, Mobile, Alabama 36617, Eugene Seidel, Asst. U.S. Attorney, Federal Courthouse, Mobile, Alabama 36602, John Grisso, U.S. Department of Housing and Urban Development, Room 676, Richard B. Russell Federal Building, 75 Spring Street, S.W., Atlanta, GA 30303-3388 and the Solicitor General, Department of Justice, Washington, D.C. 20530 by depositing the same in the United States mail, properly addressed and first class postage prepaid and Joseph Spaniol, Clerk, United States Supreme Court, 1 First Street, N.E., Washington D.C. 20543 by certified mail, properly addressed and first class postage prepaid.

Nathan P. Friedlander

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CLARENCE E. CRAYTON WILLIE MAE CRAYTON and EDRICE C. RIVERS, Plaintiffs, v. THE PRICHARD HOUSING AUTHORITY, THE CITY OF PRICHARD and RICHARD COMPTON, as Director of Housing and Urban Development, Defendants.	)	CIVIL ACTION NO. 87-0576-B

JUDGMENT

Pursuant to the Findings of Fact and Conclusions of Law entered this day, it is hereby ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of defendants.

DONE this the 5th day of April, 1989.

Charles R. Butler, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-7375

D.C. DOCKET NO. 87-0576-B

CLARENCE E. CRAYTON,
WILLIE MAE CRAYTON,
EDRICE RIVERS,

Plaintiffs-Appellants,

versus

THE PRICHARD HOUSING AUTHORITY,
THE CITY OF PRICHARD,
JACK KEMP, DIRECTOR OF HOUSING
& URBAN DEVELOPMENT,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Alabama

(April 30, 1990)

Before ANDERSON and EDMONDSON, Circuit Judges,
and GODBOLD, Senior Circuit Judge

PER CURIAM:

AFFIRMED. See Circuit Rule 36-1.

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-7375

CLARENCE E. CRAYTON,
WILLIE MAE CRAYTON,
EDRICE RIVERS,

Plaintiffs-Appellants,

versus

THE PRICHARD HOUSING AUTHORITY,
THE CITY OF PRICHARD,
JACK KEMP, DIRECTOR OF HOUSING
& URBAN DEVELOPMENT,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Alabama

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion April 30, 1990, 11 Cir. 198_, ___ F.2d ___).

Aug. 3, 1990

Before ANDERSON and EDMONDSON, Circuit Judges, and GOLDBOLD, Senior Circuit Judge.

PER CURIAM:

(✓ The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and

the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

J. L. Edmondson
United States Circuit Judge

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CLARENCE E. CRAYTON, WILLIE MAE CRAYTON and EDRICE C. RIVERS,	)	CIVIL ACTION NO.
Plaintiffs,	)	87-0576-B
v.	)	
THE PRICHARD HOUSING AUTHORITY, THE CITY OF PRICHARD and RICHARD COMPTON, as Director of Housing and Urban Development,	)	
Defendants.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case is before the Court for consideration of the motions of the defendants, Housing Authority of the City of Prichard and Richard Compton as Director of Housing and Urban Development, for summary judgment. The Court, having carefully considered the motions, the briefs, the exhibits, and the applicable law, finds and concludes as follows:

Findings of Act

1. Plaintiffs Clarence E. Crayton and Willie

Mae Crayton filed this action on May 12, 1987, in the Circuit Court of Mobile County, Alabama. On June 22, 1987, the United States of America, on behalf of its agency, The United States Department of Housing and Urban Development (HUD), filed a petition in the United States District Court of the Southern District of Alabama, Southern Division, petitioning the Court to remove the case from the Circuit Court of Mobile County to this Court. Subsequent to removal, Edrice Rivers was joined as a plaintiff in the action.

2. (A) Count One of plaintiffs' complaint alleges that their applications [proposals] for funding for their rental units under the Section 8 Moderate Rehabilitation Housing Program were arbitrarily and capriciously denied by defendant Housing Authority of the City of Prichard (Housing Authority), which administers the program under a contract with HUD. The complaint cites no specific constitutional provision, statute, rule or regulation that is alleged to have been

violated.

(B) Plaintiffs allege in Court Two of the complaint that the actions of the Housing Authority in denying their applications [proposals] constitute inverse condemnation of their property and resulted in an involuntarily servitude being placed upon it in contravention of the Constitution of the State of Alabama. The complaint cites no specific provision of the Alabama Constitution that was contravened.

(C) Count Three of plaintiffs' complaint alleges that the actions of the Housing Authority violated due process rights of plaintiffs under the Fifth and Fourteenth Amendments to the United States Constitution and also under 42 USC Sec. 1983.

3. The Housing Authority is a corporation formed under the laws of the State of Alabama. It is administered by a five member Board of Commissioners appointed by the Mayor of the City of Prichard. Charles Pharr is the Executive

Director of the Authority.

4. The Housing Authority administers a program known as the Section 8 Moderate Rehabilitation Program, which is funded by HUD. The program was created by Congress in 1978 by amendment to the United States Housing Act of 1937 and is designed to achieve three major objectives:

a. To upgrade substandard housing and provide rental subsidy to low and moderate income to families.

b. To preserve and revitalize Community Development Areas with special priority given to properties located in the City of Prichard to compliment development efforts in these neighborhoods.

c. To provide improved living conditions for low and moderate income families while maintaining their housing costs at an affordable level.

42 U.S.C. Sec. 1437f(e) (2).

The regulations which implement this program are outlined at 24 C.F.R. 882, subpart E.

5. Pursuant to its Administrative Plan, adopted in accordance with applicable regulations,

the Housing Authority solicited proposals from owners of rental property in the City of Prichard through a Public Notice/Request for proposals in the spring of 1984 for participation in the Moderate Rehabilitation Program. One hundred fifty rental units were allotted to the Housing Authority for placement in the program by HUD.

6. Proposals were submitted on approximately 450 units and each owner who responded to the solicitation for proposals was provided an Owner's Packet. In each packet was information which stated the required contents of the owner's proposals and gave a general description of the criteria to be used by the Housing Authority in evaluating, ranking, and selecting eligible proposals. The criteria encompassed environmental requirements and health conditions, including specifications for water and sewage service to the proposed properties.

7. Owners selected to participate in the Section 8 Moderate Rehabilitation Program enter

into a contract with the Housing Authority, whereby the Housing Authority guarantees lease payments to the owners on behalf of eligible tenants who reside in their rental units for a fifteen year period.

8. During the months of November and December, 1984, the plaintiffs submitted proposals to place approximately 89 rental units owned by them under the Moderate Rehabilitation Program. All of the units proposed by the plaintiffs were in a subdivision located in the City of Prichard known as the Prichard Homes Subdivision.

9. There existed in the Prichard Homes area at all times pertinent to this lawsuit an imminent health threat to the health and safety of persons residing there resulting from standing sewage and the infiltration of raw sewage into water lines because water and sewer lines ran through the same trench.

10. The Housing Authority notified the plaintiffs and all other applicants from the

Prichard Homes area by certified mail dated May 13, 1985, that their proposals were not accepted due to the unsanitary conditions affecting the properties in that area. The Housing Authority advised in that letter that it was not "accepting properties located in the Prichard Homes area, as it has been determined that existing conditions violate program regulations and pose a threat to the health and safety of residents." The letter also told plaintiffs that the Housing Authority and federal and state agencies were proposing comprehensive redevelopment of the area.

11. On or about the 21st day of May, 1985, plaintiffs Clarence Crayton and Edrice Rivers requested a hearing before the Board of Commissioners of the Housing Authority concerning the decision not to accept their proposals.

12. On June 6, 1985, plaintiff Clarence Crayton, on behalf of himself, Willie Mae Crayton, and Edrice Rivers, appeared before the Board of Commissioners requesting reconsideration of the

rejection of their proposals. In addition to making an oral presentation, Mr. Crayton offered reasons in writing as to why the proposals should be accepted for participation in the Moderate Rehabilitation Program.

13. By letter dated June 28, 1985, Charles Pharr, Executive Director of the Housing Authority, notified plaintiffs Clarence Crayton and Edrice Rivers that the Board of Commissioners had decided to uphold its initial decision to not accept the proposals submitted by the plaintiffs.

14. In addition to the reasons presented at the June 6, 1985 meeting, Clarence Crayton felt that after the Housing Authority determined that it could not fund proposals in the Prichard Homes Subdivision, it should have cancelled the process altogether and allowed him to submit proposals on other properties owned by him in Prichard that may have been eligible for the program. He felt that the entire process should have been started over even though there were more than enough units

submitted in other qualifying proposals to meet the Housing Authority's entire 150 unit allocation.

15. As opposed to believing that the Housing Authority had no basis at all for its decision, plaintiffs do not agree with the Housing Authority's reasons for rejecting proposals in the Prichard Homes Subdivision and do not believe that the reasons given were true.

CONCLUSIONS OF LAW

I. The "Arbitrary and Capricious" Claim

1. In Roberts v. Secretary, Department of Housing and Urban Development, 473 F.Supp. 52 (N.D.Miss. 1979), the court held that for a decision to be "arbitrary and capricious," it "must be based on facts not supported by the record; however, factual certainty is not necessary, and an agency may regulate even though facts do not illustrate a clear path." Id. at 59 (citing National Citizens Commission for Broadcasting v. F.C.C., 555 F.2d 938 (D.C. Cir.

1977) (aff'd in part and reversed on other grounds, 436 U.S. 775 (1978)).

2. Under the "arbitrary and capricious" standard of review, the reviewing court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment," and it cannot "substitute its judgment for that of the agency." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). See also Colonial Fast Freight Lines v. United States, 443 F.Supp. 73 (N.D. Alabama S.D. 1977) and American Federation of Government Employees v. Hoffman, 427 F.Supp. 1048 (N.D. Ala. 1976). Further, in determining whether the relevant factors have been considered by the agency, the court may consider only a basis articulated by that agency in its order as supporting authority for that order. Burlington Truck Lines v. United States, 371 U.S. 156 (1962); Securities Exchange Commission v. Chenery Corp., 332 U.S. 194 (1947). The Roberts

court stated that "it is not for the reviewing court to supply its own interpretation so long as the interpretation or determination applied by the agency was reasonable, even though that interpretation might not appear as reasonable as some others." Roberts, 473 F.Supp. at 54.

3. The Housing Authority did not accept plaintiffs' proposals, nor those of other owners, to place properties owned by them located in the Prichard HOmes Subdivision in the Moderate Rehabilitation Program of the city of Prichard because it determined that water and sewage conditions in the area violated program regulations and posed a threat to the health and safety of the residents, and because a comprehensive redevelopment plan was proposed to improve existing conditions in the area, which included the correction of the water and sewer problem.

4. Based on the conclusions set forth in paragraphs one through three, this Court is

unwilling to substitute its judgment for that of the Housing Authority and concludes that the actions of the defendant Housing Authority of the City Prichard were reasonable and were not arbitrary and capricious, and that said defendant is entitled to judgment as a matter of law on this issue.

II

II. No Private Right of Action

5. In Cedar-Riverside Associates, Inc. v. Minneapolis, 606 F.2d 254 (8th Cir. 1979), the Eighth Circuit Court of Appeals addressed the question of whether plaintiffs have a right of action enforceable in Federal Court under the National Housing Act. In this case, private developers brought suit against the city housing redevelopment authority, the city, and other defendants in connection with an urban development housing project. An appeal was taken after the District Court dismissed four claims.

6. The Court of Appeals held that the

complaint, alleging that the defendants breached their statutory obligation to comply with the national housing policy established in the National Housing Act of 1937 (claiming that the failure to follow established housing policy interfered with their contractual relations), failed to state a claim upon which relief could be granted, since the National Housing Act did not create a private cause of action for violation of such statutory obligation. The Court of Appeals, upholding the District Court, stated the following, equally applicable to the instant case:

> "...we determine first that appellants do not belong to a class for whose special benefit Congress enacted the Housing Act. If Congress intended the Housing Act to benefit any particular class of persons, that class must be the inhabitants of inadequate housing, not private developers of housing projects." Id., p. 257.

7. See also Guran Co. v. Akron, 546 F.2d 201, 204 (6th Cir. 1976). Both of these cases, as

well as those discussed below, demonstrate that the plaintiffs do not have a private right of action to maintain this action, and that the lawsuit must be dismissed.

III. Lack of Standing

8. In order for the plaintiffs to have a federally protected property right to participate in the MOderate Rehabilitation Program under the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. 1983, plaintiffs must have a "legitimate claim of entitlement" to such participation which must be "more than an an abstract need or desire for [a government benefit] ... more than a unilateral expectation of it." Board of Regents v. Roth, 408 U.S. 564, 577 (1970).

9. The purpose of the National Housing Act of 1937 is to provide housing for low-income persons. 42 U.S.C. Sec. 1437. In Moses v. Banco Mortgage Co., 778 F.2d 267 (5th Cir. 1985), the court held that owners of low income housing

projects or investors in them do not have a right to participate in HUD programs under the National Housing Act (42 U.S.C. Secs. 1437, et. seq.) or HUD regulations, because neither the Act nor the regulations were designed to benefit them. The District Court had entered summary judgment in favor of the defendants and, on appeal, the Court of Appeals held that neither owners of low-income properties not bidders at a HUD mortgage auction had standing to maintain a legal action challenging the award of a mortgage bid to Banco Mortgage Company:

> "We hold that neither the Federal Housing Act nor the HUD regulations was intended directly to benefit either owners of low income housing projects or parties bidding at the HUD mortgage auction. Since any benefit that Moses may have received as a result of the statute or regulation was unintentional or incidental, we hold that Moses lacks standing to brings Counts I and II of his complaint."

Id., p. 271. Rather, the persons within the "zone of interests" to be protected by the Act and the

regulations are low-income tenants who require housing. See also Guran Co. v. Akron, 546 F.2d 201 (6th Cir. 1976) (citing Cort v. Ash, 422 U.S. 66 (1975)).

10. Not even low-income persons rejected as tenants have standing under the Federal Housing Act or HUD regulations. In Eidson v. Pierce, 745 F.2d 453 (7th Cir. 1984), the court stated that "Section 8 is ... not a simple entitlement program" such as a public welfare benefit program of the type that was the subject of the landmark decision in Goldberg v. Kelly, 397 U.S. 254 (1970). "In Goldberg," as the Eidson court notes, "and numerous other public benefit cases, the law established eligibility criteria, and any person who satisfied those factual criteria were entitled to the benefits." Id. at 461.

11. In contrast, the court held that plaintiffs, potential Section 8 tenants, did not have a "legitimate claim of entitlement" to housing even though they were eligible for it,

concluding that entitlement came into being only after a private owner accepted their applications as tenants. The court noted that owners could not be compelled to accept all applicants because the regulations specifically gave the owners the authority to choose from those persons they expected to be responsible tenants, stating that the "Section 8 Program does not constrain the owner's judgment on that question" Id.

12. The court further concluded that there is nothing in the Section 8 law to suggest that Congress intended for potential tenants to have enforceable rights to section housing in particular projects, even though the Section 8 Program is designed for low income tenants who meet basic eligibility criteria. Id. at 462 ("Section 8 entitlements depend on discretionary judgments which, in some respects, are not constrained by any legal criteria.").

13. This Court concludes that the administration of the Section 8 Moderate

Rehabilitation Program is placed by HUD in public housing authorities, such as defendant Housing Authority of the City of Prichard, to administer within their sound discretion and judgment subject only to the broad guidelines, standards and regulations promulgated by HUD.

14. In selecting the Owners to participate, the Housing Authority used the standards promulgated by HUD, which were made known to owners submitting proposals. Among these standards were the consideration of the environmental requirements and health conditions specifically with respect to the condition of the water and sewage servicing the properties proposed. Upon discovering the existence of the problem in the Prichard Homes area and learning of efforts to correct it and redevelop the area by the Prichard Water and Sewer System and the City of Prichard, the Housing Authority opted to join those efforts rather than invest monies in a fifteen year project there.

15. The Court thus concludes that plaintiffs cannot properly raise due process claims because they do not have a property interest and have no right that is enforceable in this Court. Moses v. Banco Mortgage Co., 778 F.2d 267 (5th Cir. 1985); Eidson v. Pierce, 744 F.2d 453 (7th Cir. 1984). They may have an expectancy, a need, or desire, but do not have a "legitimate claim of entitlement." Roth, 408 U.S. at 577. A person has no right to a valuable governmental benefit and the government can deny him the benefit for any number of reasons that do not infringe on a constitutionally protected right. Perry v. Sinderman, 408 U.S. 593 (1972). The reasons used by the Housing Authority of the City of Prichard were completely valid, as were all of the actions undertaken in connection with plaintiffs' proposals and in the distribution of Moderate Rehabilitation funds. Those reasons would have been sufficient even if plaintiffs had a constitutionally protected property right to

participate in the Moderate Rehabilitation Program.

IV. Inverse Condemnation

16. The Supreme Court of Alabama, in Ex Parte Carter, 395 So.2d 65 (Ala. 1980), stated:

> [A]n action claiming inverse condemnation is very limited and ... all elements must be present. Inverse condemnation in defined as the taking of private property for public use without formal condemnation proceedings and without just compensation being paid by a governmental agency or entity which has the right or power of condemnation.

Id. at 67.

17. The Carter court further stated:

> A grant of the power of eminent domain, which is one of the attributes of sovereignty most fraught with the possibility of abuse and injustice, can never pass by implication. When the power is granted, the extent of its exercise is limited to the express terms or clear implication of the statute in which the grant is contained."

Id. (citing City of Birmingham v. Brown, 241 Ala.

203, 207; 2 So.2d 305, (1941)) (emphasis supplied).

18. This Court concludes that although the Housing Authority does have the power of eminent domain pursuant to section 24-1-28 of the Code of Alabama (1975), it has not taken any of the property belonging to the plaintiffs. Therefore, no inverse condemnation of plaintiffs' property has occurred.

19. For all of the foregoing factual findings and legal conclusions, the Court finds that there is no genuine issue as to any material fact and concludes that the defendants are entitled to judgment as a matter of law on all issues.

It is so ORDERED.

DONE this the 5th day of April, 1989.

Charles B. Butler, Jr.
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
JAN 14 1991
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-759

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

CLARENCE E. CRAYTON, et al.,
Petitioners,

vs.

PRICHARD HOUSING AUTHORITY, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT PRICHARD HOUSING AUTHORITY IN OPPOSITION

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QUESTIONS PRESENTED

I. Did the Court of Appeals correctly decide the issues involved in this case on the basis of settled applicable decisions of this Court and the decisions of courts of appeals?

II. Does this case involve a federal question which has not been settled by this Court of such exceptional importance as to warrant review by certiorari?

PARTIES

The full listing of the parties in this case taken from the caption of the pleadings is as follows:

A. Petitioners:

Clarence E. Crayton, Willie Mae Crayton and Edrice C. Rivers.

B. Respondents:

Prichard Housing Authority[1], The City of Prichard[2], and Richard Compton, as Director of Housing and Urban Development.

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[1]Respondent, Prichard Housing Authority was incorrectly designated in the plaintiffs' complaint. The correct designation is Housing Authority of the City of Prichard.

[2]The City of Prichard was dismissed from this action by stipulation.

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No. 90-759

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

CLARENCE E. CRAYTON, et al.,
Petitioners,

vs.

PRICHARD HOUSING AUTHORITY, et al.,
Respondents.

BRIEF OF RESPONDENT PRICHARD HOUSING AUTHORITY IN OPPOSITION

OPINIONS BELOW

The opinion of the district court, styled as follows, *Clarence E. Crayton, et al., v. Prichard Housing Authority, et al.*, DKT NO. 87-0576-B, was filed and entered on April 5, 1989, Judgment Entry No. 6091, in the records of the clerk for the United States District Court for the Southern District of Alabama, Southern Division.

The opinion of the United States Court of Appeals for the Eleventh Circuit, No. 89-7375, was entered per curiam on April 30, 1990 pursuant to Eleventh Circuit Rule 36-1 as a non-published opinion. Appellants' Petition for Rehearing and Suggestion for Rehearing En Banc was denied per curiam on August 3, 1990.

STATUTES

The relevant rules, statutes and regulations, which are set forth verbatim in the Appendix hereto, are as follows:

1. Fifth Amendment, United States Constitution.

2. 42 U.S.C. Section 1983.

3. 24 C.F.R. 882.504(a) (1987).

4. 24 C.F.R. 882.504(c) (1987).

5. 24 C.F.R. 109(h) (1987).

6. 24 C.F.R. 109(k) (1987).

7. 11th Cir.R. 36-1.

STATEMENT OF THE CASE

The petitioners, plaintiffs below, Clarence E. Crayton, Willie Mae Crayton and Edrice Rivers (the daughter of the Craytons), filed this action in the Circuit Court of Mobile County against the Prichard Housing Authority ("Housing Authority"), Richard Compton, as Director of Housing and Urban Development, and the City of Prichard. The United States of America on behalf of its agency, The United States Department of Housing and Urban Development ("HUD"), filed a petition in the District Court for removal.

The Housing Authority of the City of Prichard ("Housing Authority") is a corporation formed under the laws of the State of Alabama. It is administered by a Board of Commissioners. Charles Pharr is the Executive Director.

The Housing Authority administers, inter alia, a program known as the Section 8 Moderate Rehabilitation Program which is funded by the U.S. Department of Housing and Urban Development ("HUD") whose Regional Director, Richard Compton, was sued in his official capacity. The Moderate Rehabilitation Program was created by Congress in 1978 by amendment to the United States Housing Act of 1937, 42 U.S.C. Section 1437 f. It is designed to achieve three major objectives:

a. To upgrade substandard housing and provide rental subsidy to low and moderate income families.

b. To preserve and revitalize Community Development Areas...and to compliment development efforts in these neighborhoods.

c. To provide improved living conditions for low and moderate income families while maintaining their housing costs at an affordable level.

(R-Vol. 1, PHA Exh. 1,2 to Doc. #29)

The Housing Authority solicited proposals from owners of rental property in the City of Prichard in the Spring of 1984 for participation in the program. One hundred fifty (150) rental units were allotted to the Housing Authority for placement in the program by HUD. (R-Vol. 1, PHA, Exh. 1, to Doc. #29, P. 1)

Proposals were submitted on approximately four hundred fifty (450) units and each owner who responded to the solicitation for proposals was provided an Owner's Packet

which included the required contents of the owner's proposals and gave a general description of the criteria to be used in evaluating, ranking and selecting eligible proposals. Proposals on approximately 200 of the units submitted that met basic threshold criteria were ranked.

The criteria described in the Administrative Plan and/or the Owner's Packet pertinent to this case are the following:

a. The amount of rehabilitation to be accomplished, with the highest points awarded for the most rehabilitation.[1]

b. Consideration of environmental and/or historic preservation requirements.

The petitioners submitted proposals to place approximately 89 rental units under the Program. All of petitioners' units were in a subdivision known as the Prichard Homes Subdivision. (R. Vol. 1, PHA Exh. 8 to Doc. #29, Crayton Deposition. P. 33).

The Housing Authority notified the petitioners and all other owners who submitted proposals on properties in the Prichard

---

[1]HUD requires that preference be given to those proposals reflecting the most rehab per unit, see 24 C.F.R. Section 882.504(c)(4)(1987)(App. at A-4).

Owners selected to participate in the Section 8 Moderate Rehabilitation Program contract with the Housing Authority whereby they are guaranteed lease payments on behalf of eligible tenants of their units for a 15 year period. These payments include funds to reimburse the owners for out of pocket expenditures made to rehabilitate the properties. (R.Vol. 1, Exh. 2, Doc. #29).

Homes Subdivision by certified mail that it was not "accepting properties located in the Prichard Homes area, as it has been determined that existing conditions [involving the water and sewer system] violate program regulations and pose a threat to the health and safety of residents." The letter further advised petitioners that they could request an informal hearing regarding the decision and told them that "the City of Prichard and the Housing Authority, in conjunction with other federal and state agencies, are proposing a comprehensive redevelopment plan for the area to improve existing conditions." (R-Vol. 1, PHA Exh. 3 to Doc. #29). None of petitioners' proposals was deemed to have met threshold eligibility requirements for these reasons, and, therefore, not ranked, initially. (R-Vol. 1, PHA Exh. to Doc. #29 and Pharr Deposition, P. 68-69).

Shortly afterwards, petitioners requested a hearing before the Housing Authority's Board of Commissioners. Petitioner Clarence Crayton, on behalf of all petitioners, appeared before the Board of Commissioners seeking reconsideration of the decision regarding their proposals. Subsequent to the hearing, Charles Pharr, Executive Director of the Housing Authority, notified petitioners in writing that the Commissioners upheld their initial decision not to accept the proposals submitted by the petitioners on Prichard Homes properties. (R.Vol. 1, PHA Exh. 5 to Doc. #29).

Petitioners take the position that upon the Housing Authority determining that it would not fund any of the proposals for the Prichard Homes area, "...the whole examination should have been cancelled and do the thing over, if you was going to be fair with me," even though the Housing Authority had more than enough qualified proposals outside of the Prichard Homes area to fill its 150 unit allotment under the Program. (R.Vol. 1; Crayton Deposition, Pgs. 32-36; 54-59 attached to Doc. #29).

When asked, whether he was claiming that the Housing Authority had no basis for the denial of their proposals, petitioner Clarence Crayton responded, "I don't - I don't agree with the reasons they gave." (R-Vol. 1, Crayton Deposition, P. 58, attached to Doc. #29). He later stated that the reason given by the Housing Authority was not true because he already had units funded under other programs in the Prichard Homes area and...they [tenants] wasn't suffering any..." (Crayton Deposition, P. 59, attached to Doc. #29).

More than a year later the Housing Authority reclaimed some Moderate Rehabilitation Program funds from an owner who had been selected to participate but who died before completing his contract obligations. It used this money to fund four units in the Prichard Homes Subdivision owned by William Clark, after a commitment had been made by the City of Prichard, HUD and The Alabama Department of Economic and Community Affairs ("ADECA") to redevelop the Prichard Homes area and correct the water and sewage problem and after a grant application seeking money to correct that problem had been approved for funding. A redevelopment plan was adopted by the City of Prichard reflecting this. (Appendix to record below, Doc. 7, P. 8, Agreed Fact #25 of Proposed Pre-trial Order). Clark's proposal, like all others in Prichard Homes, had not been accepted initially and before it was funded, all Prichard Homes proposals were ranked using the criteria described above and Clark's units ranked first which was never challenged by the petitioners. (R.Vol. 1, PHA Exh. 8 to Doc. #29).

Contrary to petitioners' statement on page 9 of their petition, Mr. Clark is not the State of Alabama Congressional Representative for the Prichard district but is a state Representative from Prichard serving in the Alabama

Legislature which has no relevance to the issues presented here. (R.Vol. 1, Doc. #35, Clark Deposition, P. 5, Appendix to record below Doc. #8 Clark Deposition, P. 8).

Mr. Clark is also a realtor and once served on the Housing Authority's Board of Commissioners. He left the Board in 1979 and has had no official association with it since. His proposals were submitted in 1985. (R-Vol. 1, Clark Deposition, P. 35 attached to Doc. #35, Appendix to record below, Doc. #8, Clark Deposition, P.8).

The Housing Authority also funded Moderate Rehabilitation units in a subdivision known as Alabama Village. A water and sewer problem existed there similar to the one that existed in Prichard Homes but not as severe. There was also no redevelopment planned for that area. (R-Vol. 1, Huggins Deposition, P. 36; Pharr Deposition, Pgs. 75-76, PHA Response to Interrogatory 10 all attached to Doc. #29).

Other Section 8 programs also operate in the Prichard Homes Subdivision such as the Rental Rehabilitation Program and the existing Section 8 program. These programs have a maximum one year lease with the owner as opposed to the 15 year lease arrangement under the Moderate Rehabilitation Program meaning that they create no investment in the area that is of a permanent nature. (Appendix to record below, Doc. #8, Pharr Deposition, P. 25).

SUMMARY OF THE ARGUMENT

I.
The Housing Authority Actions Were Not Arbitrary And Capricious.

The respondent, Housing Authority of the City of Prichard,

is vested with the legal discretion, subject to certain promulgated standards, to determine which owner-applicants are selected to participate in the Moderate Rehabilitation Program. It was acting within the scope of its discretion when it decided, initially, not to select any proposals submitted on properties within the Prichard Homes Subdivision. The Housing Authority's decision was based on the fact that an imminent health threat involving the water and sewer system existed there. To reject all applications because of this problem and deciding to become part of a joint effort with the City of Prichard, HUD, and the Prichard Water and Sewer Board to correct the problem and redevelop the area was in no way arbitrary and capricious.

Its subsequent decision to fund the highest ranked proposal for four units in the Prichard Homes area was also not arbitrary and capricious. It only did so after funds were reclaimed from an owner who was originally selected but who died before he could use them, and after a proposal to correct the water and sewer problem had been funded, a redevelopment plan had been adopted and after all proposals, including petitioners', were reviewed and ranked.

II.
Petitioners Have No Legally Enforceable Right.

The petitioners do not have a right of action under the National Housing Act, which authorizes the Moderate Rehabilitation Program, that is legally enforceable because they are not members of the special class for whose benefit the Program is intended.

III.
Petitioners Do Not Have Standing.

Petitioners cannot raise due process claims because they do not have a constitutionally protected property right entitling them to participate in the Moderate Rehabilitation Program. The administration of the Program is placed within the sound discretion of the Public Housing Authorities subject only to broad guidelines, standards and regulations promulgated by HUD.

Even tenants, who are the intended beneficiaries of these programs, do not necessarily have standing under the Federal Housing Act or HUD regulations. Certainly, owners do not. The Housing Authority's reasons for rejecting petitioners' units would have been valid even if petitioners had a constitutionally protected property right.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

The Issues Involved In This Case Were Decided On The Basis Of Settled Applicable Decisions Of This Court And The Decisions Of Courts Of Appeals And Not In Conflict With Same.

A. The Court Of Appeals Correctly Concluded That The Housing Authority's Decision Was Not Arbitrary And Capricious.

The Moderate Rehabilitation Program application and approval procedure used by the Housing Authority required that if an owner's proposal is evaluated and ranks high enough,

the two criteria noted on page 4 hereof and others having been met, the Authority must conduct an inspection as set forth in 24 C.F.R. Sections 882.109(h) & (k), 882.504 (1987)(App. at A-2,3) to determine whether the water supply at the site is free of contamination and whether the site and neighborhood are reasonably free from hazards to the health, safety and general welfare of the occupants. The regulation also specifically requires that "the site and neighborhood shall not be subject to serious adverse environmental conditions, natural or manmade, such as "sewage hazards" among others.

Ken Huggins, who is the Superintendent of the Prichard Water System, testified in his deposition that raw sewage had infiltrated the waterlines in the Prichard Homes area creating an imminent threat to the public's health and safety. An application for a grant to address the problem contains the following language in its needs assessment and strategy statement section:

> "The infiltration of raw sewage into waterlines as a result of the deteriorated conditions of the sewer lines has become an imminent threat to the public health and safety. Based on data from the Mobile County Health Department, Prichard experienced a 53% increase in the incident [sic] of salmonella/shigella between 1979 and 1980. In April of 1980, five members of one family living in Prichard Homes were stricken with Shigella due to flooding and sewage overflowing into the back yard of their home." (R-Vol. 1, P. 2 of PHA Exh. 7 to Doc. #29).

In *Roberts v. Secretary, Department of Housing and Urban Development,* 473 F. Supp. 52 (N.D. Miss., 1979), the standard of review for decisions that are alleged to have been made arbitrarily and capriciously is described as follows:

"A decision to be 'arbitrary and capricious' must be based on facts not supported by the record; however, factual certainty is not necessary, and an agency may regulate even though facts do not illuminate a clear path." id at 55, citing, *National Citizens Commission for Broadcasting v. F.C.C.*, 555 F. 2d 938 (D.C. Cir. 1977). Aff'd in part and reversed on other grounds, 436 U.S. 775, 98 S. Ct. 2096 (1978).

The court also states that "[u]nder the 'arbitrary and capricious' standard of review of agency action, the reviewing court is to search for clear error of judgment, but it cannot substitute its judgment for that of the agency." id at 54. Also see *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402-416; 91 S. Ct. 814,823(1971). The *Roberts* Court goes on to say that "[t]hese cases make plain that it is not for the reviewing Court to supply its own interpretations so long as the interpretation or determination applied by the agency was reasonable, even though that interpretation might not appear as reasonable as some others." *Roberts*, supra, at 54.

The testimony of petitioner, Clarence Crayton, cited supra at pages 5,6, when viewed in the legal context described above offers the clearest of reasons why the district court properly granted respondent's motion for summary judgment and why the court of appeals was correct in upholding that ruling.

Petitioners raise in their petition that a similar health problem may have existed in Alabama Village which is irrelevant for purposes of determining whether the Housing Authority's decision not to accept proposals on properties in the Prichard Homes area was arbitrary and capricious under the law. Consider also that the City of Prichard had a chance to obtain a limited amount of funding to correct the water and sewer problem and chose the Prichard Homes Subdivision because it was smaller, the property there was in a greater state of

deterioration than in Alabama Village and the water and sewer problem was not as bad. (R-Vol. 1, Huggins Deposition, Pgs. 35-36 attached to Doc. #28; Housing Authority's response to plaintiffs interrogatory, No. 10, Deposition of Charles Pharr, pgs. 75-76, PHA Exh. 6, attached to Doc. #29).

The decision to choose Prichard Homes over Alabama Village for the grant application and redevelopment effort and to place Moderate Rehabilitation monies in Alabama Village as opposed to Prichard Homes was a matter of discretion which was exercised soundly as the law allows agencies such as the Housing Authority, *Roberts v. HUD*, supra.

Petitioners also argue that a later decision to accept a proposal by William Clark to place four units in the Program located in the Prichard Homes area after some monies had been reclaimed somehow supports their position that the initial decision was arbitrary and capricious.[2] Clark's proposal, like all of the other Prichard Homes proposals, was initially rejected by the Housing Authority because of the water and sewer problem.

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[2]Agreed fact No. 25 of the Pre-trial Order sets out the scenario that led to Clark receiving funding for four units in the Prichard Homes area.

"25. On or about the 1st day of August, 1986, the defendant, Housing Authority of the City of Prichard, reclaimed some Moderate Rehabilitation funds from an owner who had been selected, but [who] died before completing his obligations under the Moderate Rehabilitation Agreement. It used this money to fund four units in the Prichard Homes Subdivision owned by William Clark after a commitment had been made by the City of Prichard, HUD and The Alabama Department of Economic and Community Affairs to redevelop the Prichard Homes area and correct the water and sewage problem and after [a] grant application...had been resubmitted and approved by the City of Prichard reflecting this." (Appendix to record below, Doc. #7, P. 8).

Prior to funding the Clark proposal, all proposals that had been originally submitted on Prichard Homes properties were evaluated and ranked in accordance with the system described herein. Based on that system, Clark's proposal was rated the best of all those submitted. He proposed to spend more money to rehabilitate his units than any other owner who submitted a proposal for Prichard Homes properties, thus, entitling him to preference under 24 C.F.R. 882.504(c)(4)(App. at A-4) (1987). (R-Vol. 1, Doc. #29 PHA Exh. No. 8). Appellants have never challenged Clark's ranking nor those of other Prichard Homes proposals including their own at any point during these proceedings.

Petitioners must show that under no interpretation of the applicable rules, regulations and circumstances were the Housing Authority's actions reasonable or rational and that its decision was not based on a consideration of relevant factors, *F.C.C. v. National Citizens Commission for Broadcasting*, supra, 98 S. Ct. at 2116. The decision of the Housing Authority must be accorded "controlling weight unless it is plainly erroneous or inconsistent with the regulations." *Roberts v. HUD*, supra, at 55, citing *United States v. Larionoff*, 431 U.S. 864, 97 S. Ct. 2150 (1977).

B. The Court Of Appeals Applied The Correct Standard Of Review In Upholding The District Court's Determination That Petitioners Have No Private Right Of Action Enforceable Under The National Housing Act And Could Not Maintain Their Action.

Petitioners have asserted throughout the course of these proceedings that they are not making a claim based on the National Housing Act, even though the subject Program is authorized by that Act. They apparently hope to avoid the

problems that this act presents for them.

The Sixth Circuit Court of Appeals in *Guran Co., Inc., v. City of Akron, et al.*, 546 F. 2d 201 (6th Cir. 1976) squarely addressed this issue. Rejecting a contractor's contention that he had a federally protected right to a contract on which he was the low bidder, the court stated the following:

> "In analyzing the Housing Act, we note the expression of Congressional interest that private industry be encouraged to participate to the fullest extent and that the housing industry's involvement will thereby contribute to a strong national economy, 42 U.S.C. 1441. However, the class for "whose especial benefit the statute was enacted" must be the persons who inhabit inadequate housing. We deem the central purpose of the Housing Act to be "the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family..." id at 204.

Determining that a federal right of action will not be implied from an alleged violation of federal law, the court relied on *Cort v. Ash*, 422 U.S. 66; 95 S. Ct. 2080 (1975), which sets out the test to determine when a plaintiff has a private right of action that will be implied from a violation of federal law.

> "First, is the plaintiff one of the class for whose especial benefit the statute was enacted,...that is, does the statute create a federal right in favor of the plaintiff?"

"Second, is there any indication of legislative intent, also explicit or implicit, either to create such remedy or to deny one?"

"Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?"

"Finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?"

Cort v. Ash, supra, at 78, 95 A. Ct. at 2088.
Guran v. City of Akron, supra, at 204.

The issue was also addressed in *Cedar-Riverside Associates, Inc., v. Minneapolis*, 606 F. 2d 254 (8th Cir. 1979). There the court of appeals held that the complaint, alleging that the defendants breached their statutory obligation to comply with the national housing policy established in the National Housing Act of 1937 (claiming that the failure to follow established housing policy interfered with their contractual relations), failed to state a claim upon which relief could be granted, since the National Housing Act did not create a private cause of action for violation of such statutory obligation.

"...we determine first that appellants do not belong to a class for whose especial benefit Congress enacted the Housing Act. If Congress intended the Housing Act to benefit any particular class of persons, that class must be the inhabitants of inadequate housing, not private developers of housing projects." *id.*, p. 257.

The petitioners have no rights under the National Housing Act that are enforceable.

C. The Petitioners Lacked Standing To Pursue Their Due Process Claims Because They Have No Property Interest Nor Any Right To Participate In A Federally Funded Housing Assistance Program.

The law respecting federally protected property rights is clear. To establish such a right in this case, petitioners must show that they have a "legitimate claim of entitlement" to participate in this federally funded housing assistance program. They "must have more than an abstract need or desire for a government benefit...must have more than the unilateral expectation of it. *Board of Regents of State Colleges v. Roth*, 92 S. Ct. 2701, 2709; 408 U.S. 564, 577 (1970). Never has a court held that an owner has a "legitimate claim of entitlement" to participate in a federally funded housing assistance program but, rather, the opposite has universally obtained.

The Fifth Circuit addressed the issue of standing in *Moses v. Banco Mortgage Company*, 778 F. 2d 267 (5th Cir. 1985) under similar facts. The court held that owners of low income properties nor bidders at a HUD mortgage auction had standing under the Federal Housing Act. The language used by the court has particular application here,

> "A party will fall within the zone of interests if he is a member of a class of persons who was intended to be benefited by the statute or regulation. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153, 90 S. Ct. 827, 830, 25 L. Ed. 2d 184 (1970).

> Conversely, parties who receive only unintended or incidental benefits from statutes or regulations are outside the zone of interests to be protected, and thus lack standing to sue. We hold that neither the Federal Housing Act nor the HUD regulation was intended directly to benefit either owners of low income housing projects or parties bidding at the HUD mortgage auction." id at 271.

> "If investors, [like petitioners] are to fall within the zone of protection of any provision of the statute, it must be specifically found that they are intended beneficiaries of the particular statute..." id at 272.

Petitioners, in the present case, lacked standing as the district court and court of appeals properly concluded.

In *Eidson v. Pierce*, 745 F. 2d 453 (7th Cir. 1984), the court dealt with the question of whether the plaintiffs, who had applied for participation in a Section 8 existing housing program as tenants and who were eligible for participation had a "legitimate claim of entitlement" to the benefits before they were accepted as tenants by a private owner. Under the particular Section 8 sub-program at issue, owners were given the right by HUD regulations to select their tenants from a pool of eligible applicants. The plaintiffs were rejected from participation because the owners did not deem them to be suitable tenants. They sued the owners or their agents and HUD relying on 42 U.S.C. 1983 and on the Fifth Amendment.

The Seventh Circuit held that not even low-income tenant applicants have a claim of entitlement to public housing even though they were eligible for it. The court said that "Section 8 is...not a simple entitlement program" such as a public welfare benefit program of the type that was the subject of the

landmark decision in *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011 (1070). "In *Goldberg*," as the court notes, "and numerous other public benefit cases, the law established eligibility criteria, and any person who satisfied those factual criteria was entitled to the benefits." id at 461.

The court in *Eidson*, supra, also makes two other important observatons. First, there is nothing in the Section 8 law to suggest that Congress intended for potential tenants to have enforceable rights to Section 8 housing in particular projects. It also noted that "Section 8 entitlements depend on discretionary judgments which, in some respects are not constrained by any legal criteria." The court explains that latter statement as follows:

> "The problem in this case is that an owner's judgment about a tenant's acceptability is not constrained by any legal criteria under Section 8. The statute, regulations and contracts suggest information that might be relevant, but they provide no guidance in weighing that information. Instead, the matter is left entirely to the owner's business judgment." id at 463.

This rationale should especially apply for due process purposes where, as here, the property fails to meet a basic eligibility criteria in the judgment of the administering agency.

Petitioners cannot properly raise due process claims because they do not have a property interest. They merely have an expectancy, an abstract need or desire but do not have a "legitimate claim of entitlement." *Board of Regents v. Roth*, supra. The right to a valuable governmental benefit can be denied for any number of reasons that do not infringe on a constitutionally protected right. *Perry v. Sinderman*, 408 U.S.

593; 92 S. Ct. 2694(1972). The reasons used by the Housing Authority were completely valid and would have been sufficient even if petitioners did have a constitutionally protected property right to participate in the Moderate Rehabilitation Program.

Appellants cite *Hornsby v. Allen*, 326 F. 2d (5th Cir. 1984) in principal support of its position but that case seems so far off point that it merits no serious response.

II.

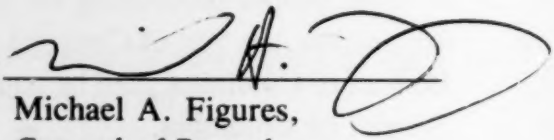
This Case Does Not Involve An Important Federal Question Which Has Not Been Settled By This Court, Is Not Of Such Exceptional Importance As To Warrant Review By Certiorari And The Court Of Appeals' Decision Does Not Conflict With This Court's Decisions.

Although petitioners make the assertion in their petition that this case is of such exceptional importance that it warrants review by certiorari, they offer nothing in support of it. The cases cited in the preceding section of this brief clearly show that any federal questions raised have been fully addressed by district courts, courts of appeals and settled by this Court. The decision of the district court and court of appeals below are consistent with the settled law and there is simply nothing so exceptionally important about this case so as to warrant review by this Court.

CONCLUSION

The court of appeals correctly concluded that the district court's order of summary judgment in favor of the respondents was supported by the record. The petitioners have no constitutionally protected property right and, therefore, have no standing to pursue a violation of same in federal court. Even if they had such a right, the action of the respondent Housing Authority of the City of Prichard, was proper in all respects and was in no way arbitrary and capricious.

Respectfully submitted,

BY: 

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42 U.S.C. 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

11th Cir.R. 36-1 Affirmance Without Opinion

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without an error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

24 C.F.R. 882.109 Housing quality standards

Housing used in this program shall meet the Performance Requirements set forth in this section. In addition, the housing shall meet the Acceptability Criteria set forth in this section except for such variations as are proposed by the PHA and approved by HUD. Local climatic or geological conditions or local codes are examples which may justify such variations.

(h) Water Supply.-(1) *Performance Requirement.* The water supply shall be free from contamination.

(2) *Acceptability Criteria.* The unit shall be served by an approved public or private sanitary water supply.

(k) Site and Neighborhood.-(1) *Performance Requirement.* The site and neighborhood shall be reasonably free from disturbing noises and reverberations and other hazards to the health, safety, and general welfare of the occupants.

(2) *Acceptability Criteria.* The site and neighborhood shall not be subject to serious adverse environmental conditions, natural or manmade, such as dangerous walks, steps, instability, flooding, poor drainage, septic tank back-ups, sewage hazards or mudslides; abnormal air pollution, smoke or dust; excessive noise, vibration or vehicular traffic; excessive accumulations of trash; vermin or rodent infestation; or fire hazards.

24 C.F.R. 882-504 Assistance to owners and selection of units.

(a) *Initial inspection.* For all proposals selected for further processing, the PHA must inspect the property. A determination must be made by the PHA as to the specific work items which need to be accomplished to bring the unit(s) to be assisted up to the Housing Quality Standards specified in Sections 882.109 and 882.404 (or other standards as approved in the PHA's application) or to repair or replace major building systems or components in danger of failing.

(c) Selection of Proposals. After the initial inspection and preliminary feasibility analysis, the PHA should select among Owner proposals those proposals which it will approve. The PHA must establish a method of selecting among Owner proposals and must make this method known to any Owner submitting or planning to submit a proposal. Proposals must be approved in accordance with criteria established by the PHA and approved by HUD, and in accordance with the following requirements:

(1) No proposal found infeasible by the PHA in the preliminary feasibility analysis may be approved unless the Owner can demonstrate that the allowable rent will be sufficient to rehabilitate, manage and maintain the unit(s) adequately;

(2) If, during the preliminary feasibility analysis, it is determined by the PHA that the work necessary to bring a unit(s) to the Housing Quality Standards, or other standards approved for the Program, or to repair or replace major systems is not sufficient to meet the $1000 per unit minimum amount of rehabilitation requirement, that unit(s) may not be assisted under the Program.

(3) If a unit(s) does not meet the requirement or paragraph (c)(2) but the Owner is proposing to accomplish at least $1000 per unit of rehabilitation by including work to make the unit(s) accessible to a handicapped or disabled individual occupying the unit(s) or expected to occupy the unit(s), the PHA may approve such units not to exceed 5 percent of the units under its Program, provided that accessible units are necessary to meet the requirements of 24 C.F.R. Part 8, which implements Section 504 of the Rehabilitation Act of 1973. The rehabilitation must make the unit(s), and access and egress to the unit(s), barrier-free with respect to the handicap or disability of the individual in residence or expected to be in residence.

(4) A preference must be provided to those proposals which indicate in the preliminary feasibility analysis the greatest dollar amount of necessary rehabilitation per unit.

(5) Prior to the approval of any unit(s) owned by a State or unit of general local government, the PHA must contact HUD and request HUD review of the site. The PHA may not enter into an Agreement on any such unit(s) until HUD approval of the site is obtained and the State or unit of general local government has sold the unit(s) to another Owner.

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JAN 15 1991
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 90-759

In the Supreme Court of the United States

OCTOBER TERM, 1990

CLARENCE E. CRAYTON, ET AL., PETITIONERS

v.

PRICHARD HOUSING AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the owners of lower-income rental housing units were deprived of due process when a local housing authority denied their proposals for subsidies under the Moderate Rehabilitation Program established under Section 8 of the United States Housing Act of 1937, 42 U.S.C. 1437f.

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. B) is unreported but is noted at 903 F.2d 829 (Table). The opinion of the district court (Pet. App. D) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1990. A rehearing petition was denied on August 3, 1990. Pet. App. C. The petition for a writ of certiorari was filed on October 9, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1978, Congress amended Section 8 of the United States Housing Act of 1937, 42 U.S.C. 1437f, to create the Moderate Rehabilitation Program (MRP). 42 U.S.C. 1437f(e)(2). The MRP "provides a vehicle to upgrade rental properties in their early stages of deterioration and maintain them in a standard condition, while providing rental subsidies on behalf of lower income tenants." 47 Fed. Reg. 34,377 (1982). Under the MRP, the Department of Housing and Urban Development (HUD) distributes funds to local housing authorities, which in turn solicit proposals for the funds from owners of lower-income units in need of rehabilitation. 24 C.F.R. 882.501, 882.503. The selected owners contract with the housing authorities to rehabilitate specific rental units, in return for which the housing authorities guarantee lease payments to the owners on behalf of the tenants chosen for those units for a 15-year period. Pet. App. D, at 5-6.

2. In 1984, HUD provided respondent Prichard Housing Authority (PHA) with MRP funding for 150 rental units. Pet. 7. PHA gave public notice of the availability of these funds and urged interested owners of rental property in the City of Prichard, Alabama, to contact PHA. Pet. App. D, at 5. PHA advised each owner who responded of the requirements for proposals and the criteria it would use to evaluate the proposals. *Ibid.*[1]

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[1] The criteria for evaluating proposals were (1) the amount of rehabilitation to be accomplished; (2) the need for temporary relocation of tenants; (3) whether the unit was occupied by an eligible family; (4) whether substandard housing units were adjacent to standard units; (5) the size of the

In late 1984, petitioners submitted proposals to place approximately 89 of their housing units under the MRP. Pet. App. D, at 6. All of these units were in the Prichard Homes Subdivision of the City. At that time, residents of the Subdivision suffered an imminent health threat from standing sewage and leakage of raw sewage into the Subdivision's water lines. *Ibid.*

PHA made a threshold eligibility determination, eliminating about 250 of the approximately 450 units for which proposals had been submitted. At this stage, all proposals for units in the Prichard Homes Subdivision were eliminated because of the health and safety threat posed by the sewage problems. PHA sent notice of this decision and the basis for it to petitioners and all other applicants with units in the affected area; applicants were also told that they could request a hearing on the decision. Petitioners Clarence Crayton and Edrice Rivers sought and were granted a hearing, at which they argued for reconsideration of PHA's decision; they also submitted their arguments in writing. After the hearing, the Board of Commissioners of PHA denied reconsideration by letter dated June 28, 1985. Pet. App. D, at 7-8; PHA C.A. Br. 10-12.

In August 1986, PHA reclaimed some MRP funds from an owner who died before completing his contractual obligations to PHA. C.A. App. Doc. 7, at 8. PHA used this money to fund four units located in the Prichard Homes Subdivision. *Ibid.* At the time of this decision, the City, HUD, and the Alabama Department of Economic and Community Affairs had entered into a commitment to correct the sewage

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unit; (6) environmental and historic preservation requirements; and (7) the unit's accessibility to the handicapped. PHA C.A. Br. 9.

problems in the Subdivision. *Ibid.* Moreover, an application for a HUD grant to alleviate the sewage problems in this area had been approved. *Ibid.*

3. Petitioners sued PHA, the City, and the federal respondent—the then Manager of HUD's Birmingham, Alabama, office—in the Circuit Court of Mobile County, Alabama, alleging that PHA's denial of their proposals for MRP funds (1) was arbitrary and capricious; (2) constituted inverse condemnation under state law; and (3) violated their rights under the Due Process Clauses of the Fifth and Fourteenth Amendments. Pet. App. D, at 2-3.[2] They sought injunctive and monetary relief. The federal respondent removed the action to the United States District Court for the Southern District of Alabama. After discovery, PHA and the federal respondent moved for summary judgment.

Petitioners moved to amend their complaint to add a claim against PHA based on the state law of fraud and a claim against all of the respondents under the Equal Protection Clause. PHA opposed the motion. The district court never ruled on the motion, and petitioners never sought to obtain a ruling.

The court granted summary judgment in favor of respondents, holding that PHA's decision rejecting petitioners' proposals was not arbitrary or capricious. The court also held that petitioners had no private cause of action under Section 8 of the Housing Act of 1937. The court further held that petitioners lacked standing to assert their due process claims because they had no constitutionally protected property interest in receiving MRP funds. Finally, because petitioners had no property interest in re-

[2] The City was subsequently dismissed from the case by stipulation of the parties.

ceiving MRP funds, the court rejected petitioners' inverse condemnation claim. Pet. App. D, at 1-21.

4. The court of appeals affirmed the district court's judgment without opinion. Pet. App. B.

ARGUMENT

1. Petitioners renew their contention (Pet. 14-16) that PHA's denial of their proposals for MRP funds violated the Due Process Clauses of the Fifth and Fourteenth Amendments. The courts below correctly rejected that contention.

a. Petitioners' due process claims are based solely on the conduct of PHA. They maintain (Pet. 14) that PHA "deviate[d] from the objective ranking system it developed for administering the [MRP program]." Petitioners do not allege any misconduct by the federal respondent.[3] Thus, petitioners have no colorable due process claim against the federal respondent, because they do not challenge any conduct by the federal respondent to which the injury they allege "fairly can be traced." *Valley Forge*

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[3] Petitioners' complaint contained only the general allegation that "the Defendants" arbitrarily managed the MRP. Compl. para. 7. Petitioners did not allege, either in their complaint or in their motion for summary judgment, that the federal respondent violated any statutes or regulations. Pet. App. D, at 2. Similarly, in unsuccessfully moving to amend their complaint, petitioners alleged only that "HUD is responsible for approving the means and method of administration of the Moderate Rehab program by PHA." C.A. App. Doc. 3, at 5. Petitioners nowhere suggested that HUD breached this responsibility. See 24 C.F.R. 882.501-882.517 (HUD regulations implementing MRP program); cf. *Payne* v. *HUD*, 551 F. Supp. 1113, 1117 (S.D. Ohio 1982) (considering, but rejecting, claim under Administrative Procedure Act that HUD inadequately monitored state's compliance with Section 8 new construction program).

Christian College v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (quoting *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41 (1976)).[4]

b. In any event, the courts below properly rejected petitioners' due process claims with respect to all of the respondents. As the district court recognized, petitioners failed to establish an interest protectable under the Due Process Clauses. See Pet. App. D, at 19-20. Petitioners' interest in receiving funds under the MRP is "an abstract need or desire," not a "legitimate claim of entitlement." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). As such, that interest is not protected under the Due Process Clauses. See, *e.g.*, *Board of Curators* v. *Horowitz*, 435 U.S. 78, 82 (1978) ("To be entitled to the procedural protections of the Fourteenth Amendment, [plaintiff] must * * * demonstrate * * * either a 'liberty' or a 'property' interest.").

That petitioners have established no protectable interest in MRP funds is clear from this Court's decisions addressing due process claims to statutory benefits. *Atkins* v. *Parker*, 472 U.S. 115 (1985) (food stamps); *Mathews* v. *Eldridge*, 424 U.S. 319 (1976) (disability insurance benefits under Title II of Social Security Act); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (AFDC). Petitioners' claims differ from those asserted in these decisions in three critical respects, each of which is sufficient to defeat petitioners' claims.

First, in contrast to the claimants in *Atkins*, *Mathews*, and *Goldberg*, petitioners are not among

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[4] See also *DeShaney* v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 197 n.4 & 201 (1989) (finding insufficient "causal connection" between state action and injury complained of to support action under 42 U.S.C. 1983).

the class of persons whom the statutory program at issue was designed to benefit. *Atkins*, 472 U.S. at 117, 128; *Mathews*, 424 U.S. at 332; *Goldberg*, 397 U.S. at 262-263 & n.8. The purpose of the Housing Act of 1937, of which the MRP is a part, is to benefit "families of lower income." 42 U.S.C. 1437. The Act evidences no intent to benefit those who, like petitioners, seek to provide housing to such families. *Moses* v. *Banco Mortgage Co.*, 778 F.2d 267, 271 (5th Cir. 1985).

Second, in contrast to the statutory programs before the Court in *Atkins*, *Mathews*, and *Goldberg*, the MRP is "not * * * a simple entitlement program." *Eidson* v. *Pierce*, 745 F.2d 453, 461 (7th Cir. 1984). Even if, contrary to the district court's holding (Pet. App. D, at 6, 11-12), petitioners satisfied the threshold statutory and regulatory criteria for MRP funds, this did not automatically entitle them to those funds. The MRP statute and regulations afford local housing authorities broad discretion in allocating scarce MRP funds among qualified applicants.[5] Thus, in contrast to the benefits at issue in *Atkins*, *Mathews*, and *Gold-*

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[5] The MRP statute authorizes the Secretary of HUD, with exceptions not applicable here, "to prescribe such terms and conditions for contracts entered into [with owners of lower-income housing] under [the MRP] as the Secretary determines to be necessary and appropriate." 42 U.S.C. 1437f(e)(2). The MRP regulations in turn grant broad discretion to local housing authorities in selecting housing providers for MRP funds, consistent with the statutory policy "to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs." 42 U.S.C. 1437. See 24 C.F.R. 882.504 (setting forth requirements applicable to selection process); see also 24 C.F.R. 882.401(a) ("PHAs may use the program to achieve local objectives * * *.").

berg, MRP funds are *not* "a matter of statutory entitlement for persons qualified to receive them." *Atkins*, 472 U.S. at 128 (quoting *Goldberg*, 397 U.S. at 262); see also *Mathews*, 424 U.S. at 335-339 (describing requirements for disability insurance benefits); cf. *Eidson*, 745 F.2d at 459-462 (in holding that applicants for Section 8 housing have no protectable interest, court relies on owners' discretion to select among applicants who meet statutory and regulatory eligibility requirements).

Finally, petitioners are not challenging the termination of a benefit, but the failure to receive it in the first instance. *Atkins*, *Mathews*, and *Goldberg*, in contrast, involved termination of benefits previously awarded. *Atkins*, 472 U.S. at 128 ("the procedures that are employed in determining whether an individual *may continue to participate* in the [food-stamp] program must comply with the commands of the Constitution") (emphasis added); *Mathews*, 424 U.S. at 332 ("the interest of an individual in *continued receipt* of [disability insurance] benefits is a statutorily created 'property' interest protected by the Fifth Amendment") (emphasis added); *Goldberg*, 397 U.S. at 260 (issue before the Court is "whether the Due Process Clause requires that the recipient be afforded an evidentiary hearing *before* the termination of [AFDC] benefits"). While the prior receipt of a benefit as to which one asserts a protectable interest may not be a necessary element of a valid due process claim, it clearly is relevant in assessing whether the interest asserted is merely an "abstract need or desire" (*Roth*, 408 U.S. at 577) or, instead, a "legitimate claim of entitlement" (*ibid.*). The absence of that element in this case significantly undercuts petitioners' due process claims. Cf. *Price* v. *Pierce*, 615

F. Supp. 173, 176-177 (N.D. Ill. 1985) (distinguishing applicants for Section 8 housing from tenants of such housing for purposes of due process analysis), aff'd, 823 F.2d 1114 (7th Cir. 1987), cert. denied, 485 U.S. 960 (1988).

c. Assuming *arguendo* petitioners had a protectable interest in receiving MRP funds, PHA's denial of those funds did not violate the Due Process Clauses.[6] The district court held that PHA's decision was not arbitrary or capricious because it was based on the "imminent health threat" posed by the sewage problems in the Prichard Homes Subdivision, where the units for which petitioners sought MRP funding were located. Pet. App. D, at 6, 11. The court of appeals sustained that holding. The courts below were clearly correct in determining that PHA acted reasonably when it withheld subsidies for housing units located in a hazardous area.[7]

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[6] It is unclear from petitioners' pleadings whether they are asserting a claim under the procedural or the substantive component of the Due Process Clauses, or both, when they argue that PHA acted arbitrarily and capriciously in denying their applications. Compare Plaintiffs Proposed Findings of Fact and Conclusions of Law, C.A. App. Doc. 6, at 8 (stating in proposed conclusion 15 that PHA "violated both substantive and procedural rights * * * under the due process clause of the Fourteenth Amendment") with Pet. C.A. Br. 11-18 (discussing only "procedural safeguards" of due process). As explained in the text, petitioners' claims fall far short of demonstrating an interest entitled to the procedural protections of the Due Process Clauses. Still less do they succeed in establishing that their claims should be reviewed under the doctrine of substantive due process. See *Regents of the Univ. of Michigan* v. *Ewing*, 474 U.S. 214, 228-230 (1985) (Powell, J., concurring).

[7] Petitioners assert (Pet. 14) that PHA's decision to deny their proposals while granting proposals by a former member

d. Finally, petitioners do not, and could not, argue that they were denied adequate procedural protections. Petitioners were notified of the reason their proposals for MRP funds were denied. Pet. App. D, at 6-7. In addition, they were provided an opportunity to argue, both orally and in writing, for reconsideration of PHA's decision. *Id.* at 7-8. Assuming petitioners had a protectable interest in MRP funds, they were afforded at least as much due process as the Constitution requires. See, *e.g.*, *McKesson* v. *Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238, 2250 & n.17 (1990); *Ewing*, 474 U.S. at 220-226; *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 542 (1985).

2. Petitioners' fact-specific equal protection claim is not properly before this Court. Petitioners argue (Pet. 17, 19-20) that they were denied equal protec-

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of PHA's Board of Commissioners for units in the Prichard Homes Subdivision over a year later was "politically motivated." Petitioners presented no evidence to support this charge. See PHA C.A. Br. 12. In contrast, PHA presented evidence indicating that the subsequent grant of MRP funds followed PHA's recovery of previously awarded funds from an owner who did not fulfill his contract obligations with PHA, and that the later grant was based on (1) the approval of a plan and associated funding to abate the sewage hazard in the Subdivision; and on (2) the fact that the proposals later granted ranked first among those received in response to PHA's initial solicitation for proposals. PHA Mot. for Summary Judgment 7-8, 13-17, Exhs. 7 & 8. For these reasons, the district court was correct in determining that no genuine issue of disputed fact existed regarding the basis for PHA's decision on petitioners' proposals. This determination was sustained by the court of appeals' affirmance of the district court's judgment. Although petitioners here repeat their unsubstantiated charge of political influence, they provide no basis for setting aside the findings below.

tion because: (1) PHA provided MRP funds for units in a subdivision where, petitioners allege, there were health hazards comparable to those in the Prichard Homes Subdivision; (2) a year after denying petitioners' proposals, PHA provided MRP funds to rehabilitate four units in the Prichard Homes Subdivision; and (3) other Section 8 housing programs were operated in the Prichard Homes Subdivision. None of these arguments was set forth in petitioners' complaint. Indeed, the complaint contained no reference to the Equal Protection Clause. As a result, neither the equal protection arguments advanced here nor the factual allegations underlying them were addressed by the courts below.[8] Petitioners provide no reason

[8] Petitioners' equal protection claims were contained in the proposed amended complaint that accompanied petitioners' motion to amend, a motion that PHA opposed. C.A. App. Doc. 3. As indicated, the district court never ruled on this motion, and petitioners never sought to obtain a ruling. In their briefs on appeal, petitioners made passing references to "the concept of equal protection," Pet. C.A. Br. 17, but "emphasized" that their claim was based on their "due process rights under the Fifth and Fourteenth Amendments" (*id.* at 12-13). See also Pet. C.A. Reply Br. 2 ("Plaintiffs now and always have submitted that their primary right to pursue a remedy in the instant action is by virtue of violation of their due process rights * * *."). Respondents' appeal briefs accordingly reflected their understanding that petitioners' assertions of disparate treatment, including their charge of political influence, were made in connection with their claim that PHA acted arbitrarily and capriciously. See Gov't C.A. Br. 15-16; PHA C.A. Br. 19-31. This is therefore not a case in which petitioners' proposed amended complaint would have merely "conformed the pleadings to the 'course of proceedings' " below. Cf. *Ewing*, 474 U.S. at 221 n.6 (granting unopposed motion to amend complaint to add claim against individual defendants not included in original complaint, which named only corporate body, where individuals always "understood the suit to be against them individually, in their official capacity").

why this Court should depart from its settled practice of refusing review under these circumstances. *E.g.*, *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (where district court denied motion for leave to amend complaint, Court refused to consider claim asserted in proposed amended complaint, since that claim had not been reviewed by either district court or court of appeals).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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